

10W4104

AP/3721\$

PTO/SB/21 (05-03)

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TRANSMITTAL FORM (to be used for all correspondence after initial filing)	Application Number	10/027,744	
	Filing Date	December 20, 2001	
	First Named Inventor	Joseph C. Walsh	
	Art Unit	3721	
	Examiner Name	Sameh H. Tawfik	
Total Number of Pages in This Submission	126	Attorney Docket Number	PP 5.71(c)

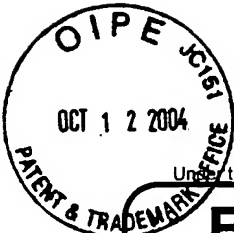
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PTO/SB/17 (10-03)

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FEE TRANSMITTAL for FY 2004

Effective 10/01/2003. Patent fees are subject to annual revision.

☐ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$) 340.00

Complete if Known

Application Number	10/027,744
Filing Date	December 20, 2001
First Named Inventor	Joseph C. Walsh
Examiner Name	Sameh H. Tawfik
Art Unit	3721
Attorney Docket No.	PP 5.71(c)

METHOD OF PAYMENT (check all that apply)☒ Check ☐ Credit card ☐ Money Order ☐ Other ☐ None☒ Deposit Account:Deposit
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11-1150

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☐ Charge fee(s) indicated below ☒ Credit any overpayments☒ Charge any additional fee(s) or any underpayment of fee(s)☐ Charge fee(s) indicated below, except for the filing fee to the above-identified deposit account.**FEE CALCULATION****1. BASIC FILING FEE**

Large Entity		Small Entity		Fee Description	Fee Paid
Fee Code	Fee (\$)	Fee Code	Fee (\$)		
1001	770	2001	385	Utility filing fee	
1002	340	2002	170	Design filing fee	
1003	530	2003	265	Plant filing fee	
1004	770	2004	385	Reissue filing fee	
1005	160	2005	80	Provisional filing fee	
SUBTOTAL (1)					(\$) -0-

2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE

Total Claims		Extra Claims		Fee from below		Fee Paid	
Independent Claims		-20** =	0	x	\$18.00	=	
Multiple Dependent		-3** =	0	x	\$86.00	=	

Large Entity		Small Entity		Fee Description	Fee Paid
Fee Code	Fee (\$)	Fee Code	Fee (\$)		
1202	18	2202	9	Claims in excess of 20	
1201	86	2201	43	Independent claims in excess of 3	
1203	290	2203	145	Multiple dependent claim, if not paid	
1204	86	2204	43	** Reissue independent claims over original patent	
1205	18	2205	9	** Reissue claims in excess of 20 and over original patent	
SUBTOTAL (2)					(\$) -0-

**or number previously paid, if greater; For Reissues, see above

FEE CALCULATION (continued)**3. ADDITIONAL FEES**

Large Entity Small Entity

Fee Code	Fee (\$)	Fee Code	Fee (\$)	Fee Description	Fee Paid
1051	130	2051	65	Surcharge - late filing fee or oath	
1052	50	2052	25	Surcharge - late provisional filing fee or cover sheet	
1053	130	1053	130	Non-English specification	
1812	2,520	1812	2,520	For filing a request for <i>ex parte</i> reexamination	
1804	920*	1804	920*	Requesting publication of SIR prior to Examiner action	
1805	1,840*	1805	1,840*	Requesting publication of SIR after Examiner action	
1251	110	2251	55	Extension for reply within first month	
1252	420	2252	210	Extension for reply within second month	
1253	950	2253	475	Extension for reply within third month	
1254	1,480	2254	740	Extension for reply within fourth month	
1255	2,010	2255	1,005	Extension for reply within fifth month	
1401	330	2401	165	Notice of Appeal	
1402	340	2402	170	Filing a brief in support of an appeal	\$340.00
1403	290	2403	145	Request for oral hearing	
1451	1,510	1451	1,510	Petition to institute a public use proceeding	
1452	110	2452	55	Petition to revive - unavoidable	
1453	1,330	2453	665	Petition to revive - unintentional	
1501	1,330	2501	665	Utility issue fee (or reissue)	
1502	480	2502	240	Design issue fee	
1503	640	2503	320	Plant issue fee	
1460	130	1460	130	Petitions to the Commissioner	
1807	50	1807	50	Processing fee under 37 CFR 1.17(q)	
1806	180	1806	180	Submission of Information Disclosure Stmt	
8021	40	8021	40	Recording each patent assignment per property (times number of properties)	
1809	770	2809	385	Filing a submission after final rejection (37 CFR 1.129(a))	
1810	770	2810	385	For each additional invention to be examined (37 CFR 1.129(b))	
1801	770	2801	385	Request for Continued Examination (RCE)	
1802	900	1802	900	Request for expedited examination of a design application	

Other fee (specify)

*Reduced by Basic Filing Fee Paid

SUBTOTAL (3) (\$) 340.00

SUBMITTED BY

(Complete if applicable)

Name (Print/Type)	Michael A. Goodwin, Esq.	Registration No. (Attorney/Agent)	32,697	Telephone	(303) 298-9888
Signature		Date	October 12, 2004		

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT
APPEALS AND INTERFERENCES

In Re Application of :)
Joseph C. Walsh)
Serial No.: 10/027,744) Group Art Unit: 3721
Filed: December 20, 2001) Examiner: Sameh H. Tawfik
For: PROCESS FOR MAKING A) Atty Dkt. PP 5.71(c)
DISPENSING ASSEMBLY)
(as amended))

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is submitted in response to the final rejection of the claims mailed May 17, 2004. A Notice of Appeal was filed on August 16, 2004.

10/18/2004 AWONDAF1 00000048 10027744

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340.00 OP

(1) REAL PARTY IN INTEREST

The real party in interest in the above-referenced patent application is Graphic Packaging International, Inc., the current assignee of the application.

(2) RELATED APPEALS AND INTERFERENCES

The present application is a continuation of application serial no. 09/220,065, filed December 23, 1998 ("the parent application"). On March 12, 2001, appellant filed a Request for Interference in the parent application requesting that an interference be declared between the parent application and U.S. Patent No. 6,145,736 to Ours et al. The Request for Interference specified that claim 28 in the parent application was identical to claim 11 in the issued Ours et al. patent (claim 20 in the present application is identical to claim 28 in the parent application and, thus, to claim 11 of the issued Ours et al. patent). An interference, however, was not declared because of the Examiner's position that claim 28 was not patentable (see the Office action mailed May 4, 2001, in the parent application).

Other than as noted above, there are no related appeals or interferences currently known to appellant, appellant's legal representatives or the assignee, which will directly affect, or be directly affected by, or have a bearing on, the Board's decision.

(3) STATUS OF CLAIMS

Claims 1-19 were filed with the application. New claims 20-35 were added and claims 1-19 canceled by preliminary amendment. New claims 36-94 were added in a subsequent preliminary amendment. Claims 27 and 29-94 were canceled and new claims 95-102 added in an amendment filed December 23, 2003. Claims 28 and 95-102 were canceled and new claims 103 and 104 added in an amendment filed March 12, 2004. Accordingly, claims 20-26, 103 and 104 are currently pending in the application, all of which stand rejected. The rejection of claims 20-26, 103 and 104 is appealed.

(4) STATUS OF AMENDMENTS

No amendments were filed or entered subsequent to the final Office action mailed May 17, 2004.

(5) SUMMARY OF THE INVENTION

In general terms, a process for making a dispensing assembly is disclosed. The dispensing assembly includes a carton (e.g., Figs. 6-9) having a liner therein and a dispensing opening. A pour spout is mounted in the dispensing opening. The

liner is bonded to the pour spout whereby, upon initial opening of the pour spout, the portion of the liner bonded to the pour spout separates from the liner, thus providing access to the container.

Appellant's invention as claimed is summarized and explained below with reference numerals, specification page numbers and drawing figure numbers indicating where the claim finds support in the specification and drawings.

20. Process for making a dispensing assembly comprising:

(a) providing carton means (160 or 290) having a dispensing opening in a side wall (16 or 228) thereof, pour spout means (122 or 194) mounted in said dispensing opening and including a front panel (124 or 250) and separate liner means (50 or 198) in said carton [Figs. 6-9; page 12, lines 3-13 or Figs. 13-17; page 16, lines 5-20];

(b) bonding said liner means (50 or 198) to said front panel (124 or 250) whereby upon initial opening of the pour spout means (122 or 194), that portion of the liner (50 or 198) bonded to said front panel (124 or 250) separates from said liner means (50 or 198) providing access to the interior thereof [Figs. 6-9; page 12, line 21 - page 13, line 9 or Fig. 15; page 15, lines 25-31; page 17, lines 16-30]

21. The process of claim 20 wherein:
said pour spout means front panel (250) comprises a lamination of a paperboard material (262) and a plastic material (264) [Fig. 15; page 15, lines 25-31].
22. The process of claim 21 wherein said plastic material (264) comprises a polyester material [Fig. 15; page 15, lines 25-31].
23. The process of claim 21 and further comprising a coating layer (266) on said plastic material (264) [Fig. 15; page 15, lines 25-31].
24. The process of claim 23 wherein said coating layer (266) comprises polyethylene [Fig. 15; page 15, lines 25-31].
25. The process of claim 23 wherein said bonding said liner means (198) to said front panel (250) comprises bonding said liner means (198) to said coating layer (266) [Fig. 15; page 16, lines 9-20].
26. The process of claim 23 and further comprising forming at least one cut line (272, 274 or 276) in said coating layer (266) [Fig. 15; page 16, lines 9-20].

103. The process of claim 20 wherein said pour spout means (122 or 194) further comprises:
a first wing portion (126 or 252); and
a second wing portion (128 or 254) [Fig. 6; page 12, lines 3-4 or Fig. 13; page 15, lines 17-19].

104. The process of claim 103 wherein said first wing portion (126 or 252) is attached to said front panel (124 or 250) at a first fold line (130 or 256) and said second wing portion (128 or 254) is attached to said front panel (124 or 250) at a second fold line (132 or 258) [Fig. 6; page 12, lines 7-10 or Fig. 13; page 15, lines 19-22].

(6) ISSUES

- A. Whether claim 20 is properly rejectable under 35 U.S.C. §101 as claiming the same invention as claim 11 of Ours et al. (U.S. Patent 6,145,736) (statutory double patenting).
- B. Whether claim 20 is anticipated by Nerenberg et al. (U.S. Patent 2,820,585) under 35 U.S.C. §102(b).
- C. Whether claims 21-26 are unpatentable under 35 U.S.C. §103(a) in view of Nerenberg et al. (U.S. Patent 2,820,585).

- D. Whether claims 103 and 104 are unpatentable under 35 U.S.C. §103(a) in view of Nerenberg et al. (U.S. Patent 2,820,585) in view of Sternau (U.S. Patent 3,605,578).

(7) GROUPING OF CLAIMS

None of the claims stands or falls together. Arguments for separate patentability are presented below for each respective claim.

(8) ARGUMENT

Relevant Law

Anticipation under 35 U.S.C. §102

The standard for lack of novelty, that is, for "anticipation," under 35 U.S.C. 102 is one of strict identity. To anticipate a claim for a patent, a single prior source must contain all its essential elements. *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 231 USPQ 81, 90 (Fed. Cir. 1986).

Legal Basis for Obviousness under 35 §U.S.C. §103

The test for obviousness under 35 U.S.C. 103 is whether the claimed invention would have been obvious to those skilled in the art in light of the knowledge made available by the reference or references. *In re Donovan*, 184 USPQ 414, 420, n. 3 (CCPA 1975). It requires consideration of the entirety of the disclosures of the references. *In re Rinehart*, 189 USPQ 143, 146 (CCPA 1976). All limitations of the Claims must be considered. *In re Boe*, 184 USPQ 38, 40 (CCPA 1974). In making a determination as to obviousness, the references must be read without benefit of applicant's teachings. *In re Meng*, 181 USPQ 94, 97 (CCPA 1974). In addition, the propriety of a Section 103 rejection is to be determined by whether the reference teachings appear to be

sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed substitution, combination, or other modifications. *In re Lintner*, 173 USPQ 560, 562 (CCPA 1972).

A basic mandate inherent in Section 103 is that a piecemeal reconstruction of prior art patents shall not be the basis for a holding of obviousness. It is impermissible within the framework of Section 103 to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art. *In re Kamm*, 172 USPQ 298, 301-302 (CCPA 1972). Phrased somewhat differently, the fact that inventions of the references and of applicant may be directed to concepts for solving the same problem does not serve as a basis for arbitrarily choosing elements from references to attempt to fashion applicant's claimed invention. *In re Donovan*, 184 USPQ 414, 420 (CCPA 1975).

It is also clearly established in the case law that a change in the mode of operation of a device which renders that device inoperative for its stated utility as set forth in the cited reference renders the reference improper for use to support an obviousness-type rejection predicated on such a change. See, e.g. *Diamond International Corp. v. Walterhoefer*, 289 F.Supp. 550, 159 USPQ 452, 460-61 (D.Md. 1968); *Ex parte Weber*, 154 USPQ 491, 492 (Bd.App. 1967). In addition, any attempt to combine the teaching

of one reference with that of another in such a manner as to render the invention of the first reference inoperative is not permissible. See, e.g., *Ex parte Hartmann*, 186 USPQ 366 (Bd.App. 1974); and *Ex parte Sternau*, 155 USPQ 733 (Bd.App. 1967).

In the case of *In re Wright*, 6 USPQ 2d 1959 (CAFC 1988), the CAFC decided that the Patent Office had improperly combined references which did not suggest the properties and results of the applicant's invention nor suggest the claimed combination as a solution to the problem which applicant's invention solved.

The CCPA reached this conclusion after an analysis of the prior case law, at p. 1961:

We repeat the mandate of 35 U.S.C. 103: it is the invention as a whole that must be considered in obviousness determinations. The invention as a whole embraces the structure, its properties, and the problem it solves. See, e.g., *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1025, 226 USPQ 881, 886 (Fed. Cir. 1985) ("In evaluating obviousness, the hypothetical person of ordinary skill in the pertinent art is presumed to have the 'ability to select and utilize knowledge from other arts reasonably pertinent to [the] particular problem' to which the invention is directed"), quoting *In re Antle*, 444 F.2d 1168, 1171-72, 170 USPQ 285, 287-88 (CCPA 1971); *In re Antonie*, 559 F.2d 618, 619, 195 USPQ 6, 8 (CCPA 1977) ("In delineating the invention as a whole, we look not only in the claim in question... but also to those properties of the subject matter which are inherent in the subject matter and are disclosed in the Specification") (emphasis in original).

The determination of whether a novel structure is or is not "obvious" requires cognizance of the properties of that structure and the problem which it solves, viewed in light of

the teachings of the prior art. See, e.g., *In re Rinehart*, 531 F.2d 1048, 1054, 189 USPQ 143, 149 (CCPA 1976) (the particular problem facing the inventor must be considered in determining obviousness); see also *Lindemann Maschinenfabrik GmbH v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1462, 221 USPQ 481, 488 (Fed. Cir. 1984) (it is error to focus "solely on the product created, rather than on the obviousness or notoriousness of its creation") (quoting *General Motors Corp. v. U.S. Int'l Trade Comm'n*, 687 F.2d 476, 483, 215 USPQ 484, 489 (CCPA 1982), cert. denied, 459 U.S. 1105 (1983)).

Thus the question is whether what the inventor did would have been obvious to one of ordinary skill in the art attempting to solve the problem upon which the inventor was working. *Rinehart*, 531 F.2d at 1054, 189 USPQ at 149; see also *In re Benno*, 768 F.2d 1340, 1345, 226 USPQ 683, 687 (Fed. Cir. 1985) ("appellant's problem" and the prior art present different problems requiring different solutions").

A reference which teaches away from the applicant's invention may not properly be used in framing a 35 U.S.C. 103 rejection of applicant's claims. See *United States v. Adams*, 148 USPQ 429 (Sup. Ct. 1966).

Argument re Issue A

The Examiner rejects claim 20 under 35 U.S.C. §101 as claiming the same invention as that of claim 11 of Ours et al. U.S. Patent No. 6,145,736. The Examiner indicates that this is a double patenting rejection.

Appellant respectfully asserts that the Examiner's rejection is improper because the Ours et al. patent is not and never has been owned by the same entity as the present application. Further, there is no common inventorship between the Ours et al. patent and the current application.

35 U.S.C. §101 is discussed in the MPEP, for example, as follows:

---SECTION---804 Definition of Double Patenting

35 U.S.C. 101 Inventions Patentable.

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

...

Before consideration can be given to the issue of double patenting, there must be some **common relationship of inventorship and/or ownership** of two or more patents or applications. Since the doctrine of double patenting seeks to

avoid unjustly extending patent rights at the expense of the public, the focus of any double patenting analysis necessarily is on the claims in the multiple patents or patent applications involved in the analysis.

(MPEP §804, emphasis added)

Accordingly, since there is no common relationship of inventorship or ownership between the Ours et al. patent and the present application, the double patenting rejection advanced by the Examiner is clearly improper.

Appellant notes that the present application is a continuation of application serial no. 09/220,065, filed December 23, 1998 ("the parent application"). The subject matter of claim 20 was first introduced by appellant in an amendment filed July 3, 2000, in the parent application (as claim 28). Accordingly, the subject matter of claim 20 was first introduced by appellant before the issue date of the Ours et al. patent (i.e., November 14, 2000). Thus, claim 11 of the Ours et al. patent is also not available as prior art against appellant's claim 20.

As noted previously, on March 12, 2001, appellant filed a Request for Interference in the parent application requesting that an interference be declared between the parent application and the Ours et al. patent. The Request for Interference specified that claim 28 in the parent application was identical to claim 11 in the issued Ours et al. patent. An interference, however, was not

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Atty Dkt. PP-5.71(c)
Appeal Brief

declared because of the Examiner's position that claim 28 was not patentable (see the Office action mailed May 4, 2001, in the parent application).

Argument re Issue B

Claim 20 stands rejected under 35 U.S.C. §102(b) as being anticipated by Nerenberg et al. (U.S. Patent 2,820,585). Appellant respectfully asserts that, for at least the reasons advanced below, claim 20 is not anticipated by Nerenberg et al.

Appellant's claim 20 recites the following:

Process for making a dispensing assembly comprising:

(a) providing carton means having a dispensing opening in a side wall thereof, pour spout means mounted in said dispensing opening and including a front panel and separate liner means in said carton;

(b) bonding said liner means to said front panel whereby upon initial opening of the pour spout means, that portion of the liner bonded to said front panel separates from said liner means providing access to the interior thereof.

Appellant respectfully asserts that the Examiner's rejection is improper for at least the following independent reasons:

- 1. The Examiner should give full faith and credit to prior determinations by the U.S. Patent and Trademark Office; and**
- 2. Claim 20 is not, in fact, anticipated by Nerenberg et al.**

The above reasons are discussed in detail below.

- 1. The Examiner should give full faith and credit to prior determinations by the U.S. Patent and Trademark Office**

As noted, for example, in appellant's preliminary amendment filed concurrently with the application on December 20, 2001, appellant's claim 20 is identical to claim 11 of issued U.S. Patent No. 6,145,736 (hereinafter the '736 Patent). Further, the Nerenberg et al. reference applied by the Examiner in the rejection of appellant's claim 20 is of record in the '736 Patent. Accordingly, the U.S. Patent and Trademark Office considered the Nerenberg et al. reference when reaching a decision to allow claim 11 during prosecution of the '736 Patent.

The current Examiner, thus, is rejecting a claim that was previously allowed by an examiner in the U.S. Patent and

Trademark Office. Furthermore, the current Examiner is basing this rejection on a reference that was considered by the previous Examiner.

MPEP §706.04 sets forth, for example, the following:

Great care should be exercised in authorizing [a rejection of a claim previously noted as being allowable].

...

Full faith and credit should be given to the search and action of a previous examiner unless there is a clear error in the previous action or knowledge of other prior art.

This section of the MPEP, thus, stresses that full faith and credit should be given to the action of a previous Examiner *unless*:

- a. there is a clear error in the previous action; or
- b. there is knowledge of other prior art.

With respect to alternative b., there is clearly no issue relative to “knowledge of other prior art” in the present case. As noted above, the Nerenberg et al. reference (the only reference applied to reject appellant’s claim 20) was considered by the previous Examiner during prosecution of the ‘736 Patent. Accordingly, in the current case, there is no issue concerning “knowledge of other prior art”.

The present Examiner, thus, is apparently taking the position that the previous Examiner committed “**clear error**” in allowing claim 11 in the ‘736 Patent. Appellant disagrees with this position. As discussed below, appellant asserts that Nerenberg et al. does not disclose a “pour spout” as recited in claim 20 and that, therefore, claim 20 is not anticipated by Nerenberg et al. The previous Examiner (in the ‘736 Patent) apparently agreed with this position since, as discussed above, the previous Examiner allowed claim 11 in the ‘736 Patent (a claim identical to appellant’s current claim 20) after consideration of the Nerenberg et al. reference. The present Examiner has supplied absolutely no reasoning or argument whatsoever as to why it is believed that the previous Examiner’s position constitutes “clear error” in this regard.

Although MPEP §706.04 generally deals with the rejection of a previously allowed claim in the *same application*, this section, nevertheless, emphasizes the importance of giving full faith and credit, absent clear error, to prior determinations by U.S. Patent and Trademark Office patent examiners.

MPEP §2307.02 addresses the specific situation in which a claim copied from an issued patent is rejected on grounds which would also be applicable to the corresponding claim(s) in the patent. Although this practice is not specifically prohibited by §2307.02, this section of the MPEP, nevertheless, emphasizes the

serious nature of rejecting a claim in this manner (e.g., by requiring approval of a Group Director when such a rejection is to be made). Such emphasis is not surprising since, by raising such a rejection, an examiner is clearly calling into question the validity of an issued U.S. patent claim.

As noted above, the Examiner in the present application has provided no explanation regarding in what way the previous Examiner (in the '736 Patent) is believed to have committed "clear error". Appellant respectfully asserts that the reason for this lack of explanation is that clear error was not, in fact, committed by the previous Examiner; thus, the action of the previous examiner should be given full faith and credit and the rejection of appellant's claim 20 should be withdrawn.

2. Claim 20 is not, in fact, anticipated by Nerenberg et al.

The Examiner takes the position that Nerenberg et al. anticipates claim 20 and states the following in support of this position on pages 2-3 of the Office action:

Nerenberg discloses a process for making a dispensing assembly comprising the steps of providing carton means (1) having a dispensing opening (U shape 4) in a side wall (2)

thereof, pour spout means (6) mounted in the dispensing opening and including a front panel; a separate liner means in the carton (liner 10); bonding the liner means to the front panel whereby upon initial opening of the pour spout means a portion of the liner bonded to the front panel separates from the liner means providing access to the interior thereof, see for example (Figs. 3, 5, and 7).

The Examiner, thus, apparently takes the position that the tab 6 of Nerenberg et al. is a "pour spout means" as recited in appellant's claim 20. Appellant respectfully disagrees with this position for the following reasons.

Referring, for example, to Fig. 3 of Nerenberg et al., the tab 6 is attached to a flap area 5. To initially open the Nerenberg et al. carton, the flap area 5 is first pushed inwardly, as shown in Figs. 3 and 4, causing the flap area 5 to pivot about a fold line formed between the flap area 5 and the carton body wall 2. The tab 6 is then used to pull the flap area 5 out of the carton as shown in Figs. 5 and 6, again by pivoting the flap area about the fold line. Finally, the flap area 5 is secured in the open position by inserting the tab 6 between the top closure 3 and the liner 10 as shown in Fig. 7 (this opening operation is discussed in Nerenberg et al. at column 3, lines 14-52).

Appellant respectfully asserts that neither the tab 6 nor the flap area 5 of Nerenberg et al. can reasonably be considered to be a "pour spout" as recited in appellant's claim 20.

It is noted that the dictionary (Webster's Collegiate, Tenth Edition, 1994) defines the noun "spout" as follows:

1 : a pipe or conductor through which a liquid is discharged or conveyed in a stream: as **a** : a pipe for carrying rainwater from a roof **b** : a projecting tube or lip from which a liquid (as water) issues **2** : a discharge or jet of liquid from or as if from a pipe; *esp* : WATERSPOUT **3** *archaic* : PAWNSHOP

Of the three definitions provided by Webster's, definitions 2 and 3 are obviously irrelevant to the current inquiry since definition 2 relates to the liquid itself and definition 3 refers to the archaic use of the term to denote a pawnshop. With respect to definition 1, "a pipe or conductor through which a liquid is discharged or conveyed in a stream" connotes a structure that contacts a liquid being conveyed and that is capable of exercising control over the movement of the liquid. Sub-definitions **a** : and **b** : continue this theme: in **a** :, "a pipe for carrying rainwater from a roof" suggests that the pipe both contacts the liquid and directs its flow; in **b** :, a tube or lip "from which a liquid ... issues" also suggests both contact with the liquid and control of its movement.

Based on the above, it is clear that any reasonable interpretation of the noun "spout" would include a structure that both contacts a liquid being conveyed and controls the movement of the liquid. The use of the term "spout" in appellant's disclosure is consistent with this interpretation (although appellant's

dispensing assembly is not specifically disclosed as being used with liquids, it is clearly useable in conjunction with flowable food products, such as cereals, that act in a more or less liquid-like manner when being poured or dispensed). Referring, for example, to appellant's drawing Figs. 6-9, it can be appreciated that the spout forming piece 122 is disclosed as including a central portion 124 and two attached wing portions 126 and 128 (see, also, e.g., appellant's written description at page 12, lines 3-4). With reference, for example, to Fig. 9, it can be appreciated that, when the spout is moved to its open position, the central portion 124 and wing portions 126, 128 together are capable of contacting, guiding and directing the product being dispensed from the carton opening.

Turning now to the current rejection, contrary to the Examiner's assertion, the tab 6 of Nerenberg et al. is not a "pour spout" given any reasonable definition of the term as discussed above. More specifically, the Nerenberg et al. tab 6 is not capable of contacting product being dispensed from the carton. With reference to Figs. 5 and 7 of Nerenberg et al., it can be seen that a flap area 5 is, at all times, located between the dispensing opening in the carton and the tab 6. Accordingly, it is not possible for the tab 6 to contact the product being dispensed from the Nerenberg et al. carton, much less control the movement of the product as it is dispensed. The Nerenberg et al. tab 6, thus, is not a "pour spout" as recited in appellant's claim 20.

It is further noted that the Nerenberg et al. flap area 5, although adjacent the dispensing opening, also cannot be considered to be a “pour spout” as recited in claim 20. With reference, for example, to Fig. 7 of Nerenberg et al., it can be appreciated that the flap area 5 is moved to an open position prior to dispensing product from the carton. In fact, as further shown in Fig. 7, the flap area 5 is held in this open position by inserting the free end of the tab 6 into a slot 13 formed in the carton (see, e.g., Nerenberg et al., col. 3, lines 44-52 where this is discussed). In this manner, the flap area 6 is held away from the carton dispensing opening (as illustrated in Fig. 7) such that the flap area will not contact product being dispensed from the carton. Accordingly, even when the Nerenberg et al. carton is tipped up in order to dispense product through the dispensing opening, the product will not contact the flap area 6. Further, the movement of the product out of the carton will clearly not be “controlled” by the flap area 6. The flap area 6 of Nerenberg et al., thus, also cannot be considered to be a “pour spout” since any reasonable interpretation of this term, as discussed above, requires a structure that both contacts and controls the movement of the flowable product being conveyed.

Since Nerenberg et al. does not disclose a pour spout as recited in claim 20, Nerenberg et al. does not anticipate claim 20. As previously noted, the standard for lack of novelty, that is, for

"anticipation," under 35 U.S.C. 102 is one of strict identity. To anticipate a claim for a patent, a single prior source must contain all its essential elements. *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 231 USPQ 81, 90 (Fed. Cir. 1986).

In summary, appellant asserts that claim 20 is not anticipated by Nerenberg et al. Further, no explanation or reasoning has been provided in support of the present Examiner's apparent position that the previous Examiner (in the '736 Patent) committed "clear error" in allowing the same claim over the Nerenberg et al. reference.

Argument re Issue C

Claims 21-26 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Nerenberg et al. (U.S. 2,820,585). Appellant respectfully asserts that, for at least the reasons advanced below, claims 21-26 are not anticipated by Nerenberg et al.

Claims 21-26 are allowable at least as ultimately depending from allowable base claim 20.

Claim 21 is allowable on further independent grounds in that neither Nerenberg et al. nor any of the other references of record, considered either alone or in proper combination, discloses or suggests the method of claim 20 and further wherein:

said pour spout means front panel comprises a lamination of a paperboard material and a plastic material.

Claims 22 and 23 are allowable on further independent grounds in that neither Nerenberg et al. nor any of the other references of record, considered either alone or in proper combination, discloses or suggests the method of claims 20 and 21 and further:

wherein said plastic material comprises a polyester material.
(claim 22)

or

comprising a coating layer on said plastic material.
(claim 23)

Claims 24-26 are allowable on further independent grounds in that neither Nerenberg et al. nor any of the other references of record, considered either alone or in proper combination, discloses or suggests the method of claims 20, 21 and 23 and further:

wherein said coating layer comprises polyethylene.
(claim 24)

or

said bonding said liner means to said front panel comprises bonding said liner means to said coating layer.
(claim 25)

or

comprising forming at least one cut line in said coating layer.
(claim 26)

The Examiner states the following on page 3 of the final Office action regarding the rejection of claims 21-26:

Nerenberg does not disclose that the pour spout means front panel comprises a lamination of a paperboard material and a plastic material nor a coating layer comprises polyethylene on the plastic material. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Nerenberg's pour spout means by having a lamination of a paperboard material and plastic material on the front panel of the pour spout and a coating layer comprises polyethylene on the plastic material, as a matter of engineering design choice, since the examiner takes an official notice that the mentioned lamination of a paperboard material and a plastic material of pour spout and coating layer comprises polyethylene on the plastic material are old, well known, and available in the art, for example milk and juice carton containers, in order to protect the paperboard from the liquid.

The Examiner, thus, admits that neither Nerenberg nor any of the other references of record provide any teaching, whatsoever, of the limitations recited in appellant's dependent claims 21-26. Appellant respectfully asserts that these limitations are not matters within the knowledge of a person of ordinary skill in the art and the Examiner has submitted no evidence to the contrary. Accordingly, there is absolutely nothing in the file history of this prosecution to support the Examiner's statement. The rejection of claims 21-26, thus, is improper. There must be something in the teachings of

cited references to suggest to an individual skilled in the art that a claimed invention would be obvious. *W. L. Gore and Associates v. Garlock, Inc.*, 220 USPQ 303, 311 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 851 (1984). "There must be a reason or suggestion in the art for selecting the procedure used, other than the knowledge learned from the applicant's disclosure." *In re Dow Chemical Co.*, 5 USPQ2d 1529, 1532 (Fed. Cir. 1988).

It is noted that, earlier in the prosecution of this application, the Examiner advanced a similar position (e.g., that it is "old" and "well known" to provide a plastic material laminated to a paperboard material as recited by appellant). See, e.g., the Examiner's comments on page 4 of the Office action mailed February 12, 2004. In response to this position, appellant argued that the Examiner had failed to provide supporting evidence and requested that the Examiner provide a sworn affidavit setting forth his qualifications along with appropriate supporting evidence if the Examiner considered himself to be an expert whose *unsupported statements* were to be given *evidentiary weight* (see appellant's response filed March 12, 2004, page 16).

Appellant also previously traversed the Examiner's assertion of official notice, for example, as follows:

Applicant further hereby traverses the Examiner's assertion of official notice. Applicant asserts that it is clearly not common knowledge to use a lamination of paperboard material and plastic material (and, specifically a polyester

plastic material as recited in claim 22) in the front panel of a pour spout as recited. Applicant hereby demands that the Examiner produce authority for his statement in the form of documentary evidence if the present rejection is to be maintained. See MPEP §2144.04 C. If, as asserted by the Examiner, the use of a lamination, as recited, is “old, well known, and available in the art”, then the Examiner should find no difficulty in producing a reference supporting this position.

(appellant's response filed March 12, 2004, page 16)

Accordingly, appellant has disputed the Examiner's assertion of official notice (and hereby again disputes it) and demanded that the Examiner produce authority for the assertion as dictated by MPEP §2144.04 C. The Examiner has failed to provide the demanded authority and yet continues, in the final Office action, to assert official notice in support of the instant rejection. Appellant, thus, again respectfully asserts that the Examiner's position is improper and that there is no *evidence* supporting the rejection of appellant's claims.

Arguments re Issue D

Claims 103 and 104 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Nerenberg et al. (U.S. 2,820,585) in view of Sternau (U.S. 3,605,578). Appellant respectfully asserts that, for at least the reasons advanced below, claims 21-26 are not unpatentable over Nerenberg et al. in view of Sternau.

Claims 103 and 104 are allowable at least as ultimately depending from allowable base claim 20. Claims 103 and 104 are allowable on further independent grounds for at least the reasons presented below.

Appellant respectfully asserts that the present rejection is improper because there is no motivation to combine the references as proposed by the Examiner. To establish a *prima facie* case of obviousness based on a combination of the content of various references, there must be some teaching, suggestion or motivation in the prior art to make the combination. "It is insufficient to establish obviousness that the separate elements of the invention existed in the prior art, absent some teaching or suggestion, in the prior art, to combine the elements." *Arkie Lures, Inc. v. Gene Larew Tackle, Inc.*, 43 USPQ2d 1294, 1297 (Fed. Cir. 1997). Also, see *In re Raynes*, 28 USPQ2d 1630, 1631 (Fed. Cir. 1993); *In re Oetiker*, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992).

In the present case, there is no teaching, suggestion or motivation in either Nerenberg et al. or Sternau to combine the references as proposed by the Examiner. The only possible motivation to combine the references arises from the teachings in appellant's own application. Reliance upon appellant's own teachings in this manner, however, is not permissible since obviousness cannot be established by hindsight combination to produce the claimed invention. *In re Gorman*, 933 F.2d 982, 986, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991). As discussed in *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1143, 227 USPQ 543, 551 (Fed. Cir. 1985), it is the prior art itself, and not the applicant's achievement, that must establish the obviousness of the combination.

Claims 103 and 104 are allowable on further independent grounds in that neither Nerenberg et al., Sternau nor any of the other references of record, considered either alone or in proper combination, disclose or suggest the process of claim 20 and further wherein:

said pour spout means further comprises:

a first wing portion; and

a second wing portion.

(claim 103)

or

said first wing portion is attached to said front panel at a first fold line and said second wing portion is attached to said front panel at a second fold line.
(claim 104)

On page 4 of the final Office action, the Examiner proposes to combine Nerenberg et al. and Sternau to render appellant's invention obvious. In explaining this rejection, the Examiner states the following on page 4 of the final Office action:

Nerenberg does not disclose a first nor a second wing portion attached to the front panel at a first and second fold line of the pour spout. However, Sternau discloses a similar process for making a dispensing assembly comprising a first and a second wing portion (Fig. 5; via wings 24 and 26) attached to the front panel at a first and second fold line of the pour spout (Figs. 1-3, 5, and 11).

Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to have modified Nerenberg's process for making a dispensing assembly by having a first and second fold line of the pour spout, as suggested by Sternau, in order to avoid undesired shifting of material from such boxes and simplify manufacturing procedures for such boxes (column 1, lines 45-46).

The Examiner, thus, takes the position that it would be obvious, in view of Sternau, to provide the Nerenberg et al. tab 6 in

the form of a pour spout having first and second wing portions. Appellant respectfully asserts that the Examiner's position is improper because modifying Nerenberg et al., as proposed by the Examiner would result in an inoperative device. It is well established that any attempt to combine the teaching of one reference with that of another in such a manner as to render the invention of the first reference inoperative is not permissible. See, e.g., *Ex parte Hartmann*, 186 USPQ 366 (Bd.App. 1974); and *Ex parte Sternau*, 155 USPQ 733 (Bd.App. 1967).

Referring, first, to Nerenberg et al., a carton 1 is disclosed having a flap area 5 defined by a U-shaped cutout 4. A liner 10 is provided on the interior of the carton 1. To open the carton 1, inwardly directed pressure is applied to the flap area 5 (see Figs. 3 and 4). The inward movement of the flap area 5 causes the liner to tear along a line following the curvature of the U-shaped cutout 4. Thereafter, the tab 6 may be used to pull the flap area outwardly to the open position shown in Figs. 5-7.

Sternau discloses, with reference to Fig. 4, a flap 12 defined by a series of perforations 40 (Fig. 5) formed in the sideface 16 (Figs. 2 and 3) of a carton 10. A separate "chute shaped channel" 22 includes a center section 20 and integrally formed wings 24 and 26 (see, e.g., Fig. 5). The wings 24, 26 are joined to the center section 20 via a pair of weakened lines 42, forming fold lines (see Sternau, col. 3, lines 7-8).

The center section 20 of the channel 22 is glued to the interior face of the flap 12 (see Sternau, col. 2, lines 40-43). To open the carton 10, the flap 12 is first pressed inwardly in order to break the perforations 40. Thereafter, the tab 38, is used to pull the flap outwardly to the open position illustrated in Figs. 1 and 2 (see Sternau, column 3, lines 11-19).

Fig. 5 of Sternau illustrates the carton 10 before it is initially opened. In this condition, the wings 24, 26 of the channel 22 are coplanar with the center section 20 and, thus, lie against the interior surface of the sideface 16. The Sternau reference discloses this arrangement, for example, as follows:

Figs. 4 and 5 show the box 10 before it is opened. Perforations 40 extend partly through the sideface 16 along the arch that defines the flap 12. For simplicity in assembly the channel 11 [sic - 22] appears unfolded flat against the interior of the sideface 16 in butterfly fashion.

(Sternau, col. 3, lines 3-7)

Accordingly, in the unopened condition shown in Fig. 5, the wings 24, 26 have not yet been folded about the weakened lines 42.

As described above, when the Sternau carton 10 is initially opened, the flap 12 (and the attached channel center section 20) is moved outwardly. This outward movement, in turn, causes the channel wings 24, 26 to contact the edges of the opening 18 and

fold about the weakened lines 42 until the wings assume a right-angle relationship with respect to the channel center section 20 and the sideface 16. This is described in Sternau, for example, as follows:

The user now grasps the inwardly leaning flap, which carries the chute-shaped channel, by means of the tab 38 and pulls the flap and spout assembly outward into the desired position. During this outward movement the flat-lying wings 24 and 26 shown in FIG. 5 as they are drawn outwardly against the vertical edges of opening 18 fold along the weakened lines 42 into the shape in FIG. 1.

(col. 3, lines 16-23)

The Examiner takes the position that it would be obvious to modify Nerenberg et al. by providing the Nerenberg et al. container with a "chute-shaped channel" of the type taught by Sternau.

Appellant points out, however, that Nerenberg et al. stresses the importance of adhering the liner 10 to the outer layer of the carton *immediately adjacent the opening*. Nerenberg et al. discusses this importance, for example, as follows:

It is important, however, in the association of the liner with the carton that the liner be adhered to the carton wall in the area of the U-shaped cut 4 defining the flap area 5; and we have found that the liner should be drawn as taut as possible across the adhered area.... By drawing the liner taut cross the flap area 5, a kind of drumhead effect is obtained, so that sharp inward pressure along the U-shaped cut will

automatically break the liner simultaneously with the formation of the pouring opening in the carton body wall.

(col. 2, line 68 - col. 3, line 10)

Nerenberg et al., thus, stresses the criticality of drawing the liner taut across the opening in order to achieve proper operation of the carton. Nerenberg et al. further teaches that this tautness is to be achieved by adhering the liner to the carton wall in the immediate vicinity of the opening.

Appellant asserts that, in the combination of Nerenberg et al. and Sternau proposed by the Examiner, the liner could not be adhered to the carton wall in the immediate vicinity of the opening and that, as a result, the requisite tautness could not be achieved. Referring, for example, to Fig. 5 of Sternau, it can be appreciated that the presence of the wings 24, 26 would prevent a liner from being adhered to the carton sideface 16 immediately adjacent the opening 18. Accordingly, the tautness stressed by Nerenberg et al. as being critical to proper operation could not be achieved in the combination proposed by the Examiner. The Examiner's proposed combination of Sternau and Nerenberg et al., thus, would result in an inoperative device.

Appellant further respectfully asserts that the Examiner's proposed modification of Nerenberg et al. would result in an

inoperative device for an additional reason as will now be discussed. As noted above, before the Sternau carton is initially opened, the channel wings 24, 26 are parallel to the carton sideface 16, as shown in Fig. 5. When the carton is opened, however, the wings 24, 26 rotate up and away from the sideface until they are perpendicular to the sideface (as shown in Figs. 1-3).

The Examiner suggests that it would be obvious to modify Nerenberg et al. by providing the Nerenberg et al. carton with a "chute-shaped channel" of the type taught by Sternau. Appellant asserts that, even if the opening could be formed in such a modified structure (and it could not as pointed out above), the existence of the liner would prevent the wings 24, 26 from being able to rotate as required for proper opening.

For the reasons set forth above, the Examiner's proposed combination of Nerenberg et al. and Sternau would result in an inoperative device. Accordingly, appellant respectfully asserts that the Examiner's rejection of claims 27 and 28 is improper:

If when combined, the references "would produce a seemingly inoperative device," then they teach away from their combination. *In re Sponnoble*, 405 F.2d 578, 587, 160 USPQ 237, 244 (CCPA 1969); *see also In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984) (finding no suggestion to modify a prior art device where the modification would render the device inoperable for its intended purpose).

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Atty Dkt. PP-5.71(c)
Appeal Brief

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... it is generally settled that the change in prior art device which makes the device inoperable for its intended purpose cannot be considered to be an obvious change. *Hughes Aircraft Co v. United States*, 215 U.S.P.Q. 787, 804 (Ct.Cl. Trial Div. 1982) modified (to affirm validity and reverse infringement holding), 717 F.2d 1351, 219 USPQ 473 (Fed. Cir. 1983).

As quoted in *Bausch & Lomb Inc. v. Barnes-Hind/Hydrocurve Inc.*, 10 USPQ2d 1929 (DC N.Cal. 1989).

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Accordingly, all of the claims are believed to be allowable and
all of the rejections should be reversed.

Respectfully submitted,
KLAAS, LAW, O'MEARA & MALKIN, P.C.

By

A handwritten signature in black ink, appearing to read 'Michael A. Goodwin', is written over a horizontal line.

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(9) APPENDIX

20. Process for making a dispensing assembly comprising:

(a) providing carton means having a dispensing opening in a side wall thereof, pour spout means mounted in said dispensing opening and including a front panel and separate liner means in said carton;

(b) bonding said liner means to said front panel whereby upon initial opening of the pour spout means, that portion of the liner bonded to said front panel separates from said liner means providing access to the interior thereof.

21. The process of claim 20 wherein:

said pour spout means front panel comprises a lamination of a paperboard material and a plastic material.

22. The process of claim 21 wherein said plastic material comprises a polyester material.

23. The process of claim 21 and further comprising a coating layer on said plastic material.

24. The process of claim 23 wherein said coating layer comprises polyethylene.

25. The process of claim 23 wherein said bonding said liner means to said front panel comprises bonding said liner means to said coating layer.

26. The process of claim 23 and further comprising forming at least one cut line in said coating layer.

103. The process of claim 20 wherein said pour spout means further comprises:

- a first wing portion; and
- a second wing portion.

104. The process of claim 103 wherein said first wing portion is attached to said front panel at a first fold line and said second wing portion is attached to said front panel at a second fold line.